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Supreme Court of the United States

October Term, 1908.

No. 1

HENRY C. KING, APPELLANT,

vs.

PANTHER LUMBER COMPANY AND JEROME T. ENGEL, APPELLEES.

Appeal From the Circuit Court of the United States for the District of West Virginia.

Brief of Maynard F. Stiles for Appellant.

IN THE

Supreme Court of the United States.

October Term, 1897.

NO. 240

HENRY C. KING, APPELLANT.

versus

PANTHER LUMBER COMPANY AND JEROME P. KROLL, APPELLEES.

Appeal From the Circuit Court of the United States, for the District of West Virginia.

Brief for Appellant.

This is an appeal from a decree of the Circuit Court dissolving an injunction previously awarded, and dismissing the bill.

On the 3rd day of August, 1895, plaintiff presented his bill (p. 1) claiming ownership of the Robert Morris 500,000 acre grant, situate in part in said district, exhibiting a perfect

chain of title thereto, alleging that said land was wild and mountainous, unfit and practically worthless for agricultural, grazing and like purposes, and valuable chiefly for the heavy growth of timber thereon, on account of which complainant purchased the same at great cost, for the cutting of which timber he had made great outlay and preparation, large quantities of which timber defendants were wrongfully cutting and removing under pretended purchases of portions of said land and of the timber standing on other portions, from persons claiming same adversely to complainant, against whom, as well as against defendants, complainant had brought actions of ejectment. The bill was ancillary to such action. At the same time defendants presented their answers (p. 29–39) defendant Kroll claiming to act only as an agent of defendant Panther Lumber Company, and said Company attempting to justify the trespass complained of, upon the ground of the extensive investment it had made and want of title in complainant, charging that said tract had been omitted from the land books of the various counties in West Virginia where same was situated, for five successive years and not charged with taxes, and was therefore forfeited to the State and the title vested in the State and in the persons under whom defendant claims, by Art. XIII of the State constitution. Defendant company also claimed title by adverse possession.

Upon the bill and the answers treated as affidavits, on the same day, District Judge Jackson awarded a temporary injunction as to all said land except about 205 acres to which defendant showed apparently superior title, and set the further hearing of motion for injunction for Sept. 19, 1895, (p. 40), upon which hearing the court continued said injunction in force until the further order of the court, and permitted defendant to remove certain timber that had been cut by it, upon executing bond." (p. 42).

On the 12th day of March, 1896, defendant, Panther Lumber Company, filed a demurrer and amended answer, (p. 43), reiterating the charge of forfeiture of complainant's title and reciting the result of the trial of the action of ejectment of *King* v. *Mullins*, (now in this court, No. 157, of the present term), and complainant on the 26th day of June, 1896, filed exceptions to some of the scandalous and impertinent matter

in the answer and amended answer, (p. 49), which was afterwards stricken therefrom, (p. 79), and also filed an amended and supplemental bill (p. 51), largely in the nature of a special replication.

On the 18th day of July, 1896, the injunction was dissolved and the bill dismissed (p. 81) by Judge Jackson solely upon the ground of forfeiture, and solely upon the strength of the ruling of Circuit Judge Goff in *King* v. *Mullins*, whose construction of the constitution in that case the district judge regarded as controling his action in the present one. From this decree complainant prayed an appeal to this Court, and a supersedeas, (p. 83), which was allowed (p. 86), August 17th, 1896, and the record lodged here September 29th, 1896, the time for filing same having been duly enlarged to that time.

The paramount questions involved in the case are: whether or not the provision is the constitution of West Virginia, which forfeits tracts of land of 1,000 acres or more for non-assessment for state taxes for five successive years, is in contravention of the Constitution of the United States; whether in this record there is any competent evidence of forfeiture; and whether a forfeiture such as is charged, if there be one, is available against a subsequent bona fide purchaser for value without knowledge or notice of such forfeiture.

SPECIFICATION OF ERRORS.

The decree of the circuit court is erroneous to the injury of appellant for the following reasons:

First: The said court erred in dissolving the injunction previously awarded and dismissing complainant's bill upon the ground that the title claimed by him to the land in question was or had been forfeited to the State of West Virginia by the constitution thereof, because the provision of said constitution which purports and attempts to forfeit and divest the title out of the owner of land and vest the same in said State or in some other person when such owner shall not have been charged with state taxes on said land on the land books for any five successive years after the year 1869, is in contraven-

tion of the Constitution of the United States, particularly Art. I, Sec. X, 1, of said Constitution and Art. XIV, Sec. 1, of the amendments thereto, and because said provision is repugnant to paramount provisions of the said state constitution, to wit, Art. III., 4, 5, 9, 10 and Art. V., 1, thereof and is null and void.

Second: The court erred in holding the title of complainant or of his predecessors to be forfeited, and in dismissing the bill because thereof; because (as is alleged in the bill and not disputed by defendants, and as the fact is) no forfeiture of the title of complainant, or of those under whom he claims, to said land, has ever been decreed, adjudged, declared or determined in any proceeding for the purpose, and could not be adjudged or enquired of collaterally, as in this suit, and could only be proven in this suit, if the fact existed, by the record of an adjudication thereof in a proper, direct proceeding thereof before a competent tribunal.

Third: The court erred in holding that any forfeiture of the title claimed by complainant had occurred, because there is nothing in the pleadings or exhibits (the only proof in the case) to warrant the court in so holding, and because the proof shows that there was no forfeiture, and that none was claimed by the State, (vide auditor's certificate filed by complainant, p. 76).

Fourth: The court erred in holding that the land claimed by complainant had been omitted from the land books of the several counties wherein the same is situate since the year 1883, and that no taxes had been paid thereon by complainant or those under whom he claims, because there is no competent evidence in the case to warrant the court in so holding.

Fifth: The court erred in dissolving said injunction and dismissing said bill on the ground of the forfeiture of the title claimed by complainant, because, as is alleged in the bill and as is undisputed by defendants, complainant purchased said land for valuable consideration in good faith and without knowledge or notice of any forfeiture or pretended forfeiture or of any pretended claim or interest of said State of West

Virginia, and the said State and all others are estopped to set up title in said State against complainant.

Sixth: The court erred in dissolving the injunction and dismissing the bill, because the bill shows perfect title to the land and to the relief sought and the answer does not deny the commission of any of the acts charged against defendants, but attempts to avoid the charge by matters that, if they were true, would constitute no defense.

Seventh: The court erred in dismissing said bill, because the same was in terms ancillary to an action of ejectment then and still pending in said court, in which action alone the question of title should have been adjudicated, complainant having shown an apparently good title by his bill.

Eighth: The court erred in dismissing the bill or dissolving the injunction upon the case disclosed by the record.

ARGUMENT.

The principle questions presented by this appeal have been so recently before this Court in *King* v. *Mullins*, No. 157, of the current term, and so fully discussed in the printed arguments for plaintiff in error in that case, though very insufficiently presented by the oral argument, that I shall merely restate here the main points relied upon against the validity of the West Virginia Constitution and the propriety of the decree appealed from, with some further brief suggestions. In this connection it is but just to the learned and able district judge who entered that decree, to remark that it is manifest from its language (p. 18) that while governed by the precedent referred to, the action of the learned judge was against his own well known judgment and conviction.

This case turned upon the following provision of the State Constitution, as did the Mullins case.

ARTICLE XIII.

LAND TITLES.

1. All private rights and interests in lands in this State derived from or under the laws of the State of Virginia, and from or under the constitution and laws of this State prior to the time this constitution goes

into operation, shall remain valid and secure and shall be determined by the laws in force in Virginia, prior to the formation of this State, and by the constitution and laws in force in this State prior to the time this constitution goes into effect.

2. No entry by warrant on land in this State shall hereafter be made.

3. All title to lands in this State heretofore forfeited, or treated as forfeited, waste and unappropriated, or escheated to the State of Virginia, or this State, or purchased by either of said States at sales made for the non-payment of taxes and become irredeemable, or hereafter forfeited, or treated as forfeited, or escheated to this State, or purchased by it and become irredeemable, not redeemed, released or otherwise disposed of, vested and remaining in this State, shall be, and is hereby transferred to, and vested in any person (designating three classes of claimants with reference to possession and payment of taxes).

6. It shall be the duty of every owner of land to have it entered on the land books of the county in which it, or a part of it, is situated, and to cause himself to be charged with the taxes thereon, and pay the same. When for any five successive years after the year 1869, the owner of any tract of land containing one thousand acres or more, shall not have been charged on such books with State tax on said land, then by operation hereof, the land shall be forfeited and the title thereto vest in the State.

What importance, if any, is to be attached to the first clause of Sec. 6, requiring the land owner to have his land entered, etc., or what is properly the effect of a neglect of that duty, is not clear, except that there can be no effect upon the owner of a tract of less than 1000 acres; but it certainly would seem to have no application to the man all of whose land was properly entered upon the land books and charged with taxes at the time the constitution was adopted, for it does not provide that the owner should do this annually or at stated times. There was no reason so to provide, for the law then in force furnished ample provision, as it does now, for the annual and perpetual entering and charging of the land by the county officers, without the aid or interference of the land owner and in spite of anything he might do, when once it has been entered.

Chapter XXIX Code of 1868 contains the provisions for assessment of taxes, in force from 1863 up to and after the adoption of the present Constitution in 1872.

Sec. 6: The assessor shall apply for the official books and papers which its predecessor had, to the person in possession thereof, and if

such person fail or refuse to deliver the same, he shall forfeit one hundred dollars.

Sec. 8 provides a board of correction and equalization composed of the assessor, recorder, sheriff and county surveyor.

Sec. 9: The assessor in making out his land book, shall in all respects correct the same, as directed by the said board, or by the supervisors on appeal, and shall correct every other mistake he may discover in the original land books; and if any taxes have been omitted for a former year, he shall enter the same, with lawful interest thereon for collection.

Sec. 10: When the assessor shall ascertain that there is any land in his district which has not before been entered in his land book, or after being so entered, has from any cause been omitted for one or more years, he shall make an entry thereof and of the name of the owner, and if there be no assessment of the same, shall proceed to make such assessment.

Secs. 14, 15, 16, 18 and 20 provide for the making of lists by the clerks of the courts, the recorder of deeds and the secretary of state, of all grants, deeds, judgments, decrees, wills, etc., affecting the title to land and for the transmission of same to the assessor in March of each year, and Sec. 24 requires the assessor to transfer on the land books all the lands mentioned in said lists and reports to the persons who appear thereby to be the owners thereof.

Sec. 39: The assessor shall begin annually on the first day of April, and proceed without delay to ascertain all persons and property, real and personal, on that day subject to taxation in his district.

These and other provisions afforded a complete system by which land once coming to the knowledge of any of these officers would find its way on to the land books and would thereafter be carried on the books through all mutations of ownership year by year.

The constitution must be viewed in the light of this law, which it in no way attempted to change, and must be held to have intended that the duty of entering the land should apply to land not then on the books, and not to persons who had already discharged that duty. The assessor is required to enter lands annually: not so the owner. It was needless to make it the duty of the owner to do what was already the the duty and remained the duty of the assessor—mandatory and under penalty.

The laws in force when the constitution was adopted have been changed so that the clerk of the county court, who is the custodian of the public records, now makes up the land books, and all changes have been in the direction of amplification of the provisions and facilities for keeping lands in the hands and under the eye of the taxing power of the state. The present law is found in Chap. XXIX Code of 1891, Sec. 8 to 39 and Sec. 77, and was in force prior to 1883, and if pursued by the officers, the escape from taxation of any land that is subject to taxation is an impossibility.

At this point I request attention to the amended bill (p. 54).

At the time West Virginia was formed there were two lines of claimants of the Morris grant under claim of title from Dumas, trustee, viz, Louis Antoine des Verges de Maupertuis and Robert E. Randall, trustee, on the one hand and Anthony Lawson on the other, the title splitting about 1846 and deed to Lawson being made in 1855. The taxes on the land had been paid by Swan from 1796 to 1811, inclusive, after which time the land went into the Literary Fund for non-payment of taxes, where it remained till released by the Act of March 15th, 1838, and vested in Dumas, from which time the taxes were paid up to the time of the war, when the land appears to have gone off the books. In 1869 Randall and Maupertuis "had it entered" in Wyoming county—the whole 500,000 acres, and about the same time Lawson had the undivided three-fourths claimed by him entered on the books of Logan county as 375,000 acres and taxes back to 1865, so that the land was on the land books and charged with taxes to the extent of 875,000 acres, when the constitution was adopted. Both these claims of title were united in this appellant's grantors before his purchase. The bill (p. 34-6) traces payment of taxes up to 1883 by redemption or otherwise, but why or how the land came not to be taxed thereafter, if it was not,—by what fraud, accident or mistake—the laws of the State furnish no process to inquire and hold it immaterial to inquire, since the cause or reason could not change the fact, and it is the naked fact of five years non-assessment, and not the cause of it, that transfers the land owner's title to the State or to a stranger. A legal title may pass by a manifest and incontestible fraud, which only a court of chancery can undo; but the State of

West Virginia cannot be sued in chancery nor at law, and a fraud by which she acquires land for non-assessment is beyond redress, if her constitution is valid, for the forfeiture and transfer of title is without condition or qualification.

"When" (which is equivalent to "whenever") the land is not charged, the constitution does the rest, and this, as it seems to me, without reference to the duty of the land owner. Wherefore I contend that the forfeiture would have been no different—neither less nor more open to legal objection—if nothing had been required of the land owner. If this view is wrong, the alternative proposition is, that the offending land owner, if he own one thousand acres or more, is fined to the extent of that land and the fine collected, without judge, jury, trial or accusation. This the constitution purports to accomplish.

THE FORFEITURE PROVISION OF THE STATE CONSTITUTION CONTRAVENES THE CONSTITUTION OF THE UNITED STATES.

Art. 1, Sec. X, 1. No state shall pass any bill of Attainder, *ex post facto* law or law impairing the obligation of contracts.

This prohibition is directed at the *state* and not at the legislature merely, and affects the state in each and all its branches, departments and instrumentalities, disabling a constitutional convention and the whole people as well as the legislature.

Treating the forfeiture as a penalty for the act or omission of the land owner, the forfeiture law is a bill of attainder.

Gaines v. *Buford*, 1 Dana (Ky.) 486; *Martin* v. *Snowden*, 18 Gratt. (Va.) 100; *Norris* v. *Doniphan*, 4 Metcalf (Ky.) 426; *Cummings* v. *State of Missouri*, 4 Wall. 323-4. This court in *Cummings* v. *Missouri*, declares "a bill of attainder is a legislative act which inflicts punishment without a judicial trial," and quotes with approval *Gaines* v. *Buford*, which contains an able discussion of bills of attainder as applied to an act very like the one at bar.

The forfeiture impairs the obligation of contracts. The grant to Morris (p. 8) like other grants of that date, was without condition (except as to 4,000 acres reserved from its opera-

tion) either in the grant or the law under which it was made. It passed an absolute, indefeasible and nonforfeitable title; and the act of March 15th, 1838, "transferred to and vested in" John Peter Dumas, in trust, "All the right, title, and interest of the commonwealth or of the president and directors of the literary fund" in and to the same land.

The resumption of the grant in the manner provided by the state constitution, impares, revokes and destroys the obligation of the executed contract of conveyance between the State of Virginia and its grantee. *Gaines* v. *Buford*, 1 Dana 488-90; *Arrowsmith* v. *Burlingim*, 4 McLean 494; *Griffin* v. *Mixon*, 38 Miss. 448.

FOURTEENTH AMENDMENT.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The forfeiture is without "due process of law" or any process whatever. There is no provision in the state constitution or the state statutes in force at the adoption of the constitution, or subsequently enacted, which requires or permits any judicial or other proceedings before or afterwards, to enquire of, adjudge, decree or declare the forfeiture or divest and transfer the title. The constitution requires and permits no aid or interference from the courts: its own terms and the flight of time are all sufficient, and no court, no process or proceeding of law, no power or agency that can be invoked can aid, prevent or defeat the forfeiture and transfer of title. The court can declare the law a nullity, but short of that it can do nothing. Such a thing is not law nor process of law nor process of any kind.

No court has ever dissented from, but many have approved the language of the court in *Wynehamer* v. *The People*, 13, N. Y.

"To say, as has been suggested, that 'the law of the land' or 'due process of law,' may mean the very act of the Legislature which deprives

the citizen of his rights, privileges or property, leads to a simple absurdity."

The forfeiture is by "mere act of legislation" and is a legislative transfer of one man's property to another, which is not due process of law as that expression is used in Magna Charta, or in the federal or state constitutions. *Dartmouth College Case*, 4 Wheat, 578; *Dorman* v. *The State*, 34 Ala. 216; *Hoke* v. *Henderson*, 4 Dev. 15; *Calhoun* v. *Fletcher*, 63 Ala. 574; *Overing* v. *Foote*, 65 N. Y. 269; *Chauvin* v. *Valiton*, 20 Pac. Rep. 658; *Denny* v. *Mattoon*, 2 Allen 378; *Baker* v. *Kelley*, 11 Minn. 480; *Taylor* v. *Porter*, 4 Hill, 145; *Loan Association* v. *Topeka*, 87 U. S. 663; *Wayman* v. *Southard*, 10 Wheat, 36; *Newland* v. *Marsh*, 19 Ill. 383; *Wilkinson* v. *Leland*, 2 Pit. 657; *Groesbeck* v. *Seeley*, 13 Mich. 329; *Davidson* v. *New Orleans*, 96 U. S. 102; *Chicago B. & Q. R. R. Co.* v. *Chicago*, 166, U. S. 226 and innumerable other cases.

Not only must there be a judicial hearing, but that hearing must be provided by the law that authorizes the taking of the property—the deprivation.

Fisher v. *McGirr, et. al.*, 1 Gray, 1; *Hibbard* v. *The People*, 4 Mich., 155; *Boggs* v. *The Commonwealth*, 76 Va., 989; *Wong Wing* v. *United States*, 163 U. S., 228; *Lowry* v. *Rainwater*, 70 Mo., 152; *Loesch* v. *Koehler*, 144, Ind., 278; *Lewis Em. Dom.*, 368, et. cet.

DENIAL OF EQUAL PROTECTION OF THE LAWS.

The forfeiture applies only to tracts of 1,000 acres or more, without reference to value, character, location, condition or any circumstance but the purely arbitrary one of size. It is an arbitrary, unequal and unjust discrimination, and violates the equality clause of the Fourteenth Amendment.

Gulf, Colorado & Santa Fe Railway v. *Ellis*, 165 U. S., 150; *State* v. *Goodwill*, 33 W. Va., 179; *State* v. *Fire Creek C. & C. Co.*, 33 W. Va., 188; *State* v. *Loomis*, 115 Mo., 307; *Millett* v. *People*, 117 Ill., 294; *Low* v. *Reese Printing Co.*, 41 Neb., 127.

TAKING PRIVATE PROPERTY FOR PRIVATE USE.

Sec. 3 of Art. XIII enacts that "all title to lands in this State * * * * hereafter forfeited or treated as forfeited

* * * * * shall be, and is hereby transferred to and vested in any person," etc., designating three classes of persons with reference claim of title, possession and payment of taxes. Thus the constitution takes the title out of one person and puts it into another—takes the private property of one man and gives it to another as his exclusive private property. This has been aptly and justly characterized by this court as not being legislation but spoliation.

Chicago, Burlington & Quincy R. R. Co. v. *Chicago*, 166 U. S., 226; *Davidson* v. *New Orleans*, 96 U. S. 102; *Loan Association* v. *Topeka*, 20 Wall, 664.

Such a thing has been so undreampt of that it has never been thought necessary to legislate specifically against it; *Norman* v. *Hesist*, 40 Am. Dec., 495. But it is none the less *not* due process of law. *Missouri Pacific Ry.* v. *Neb. Board of Transportation*, 164 U. S., 403; *Blood good* v. *M. & H. R. R. Co.*, 18 Wend., 56; *Varick* v. *Smith*, 5 Paige, 159; *Vanhorn* v. *Darrance*, 2 Dal., 304.

EXCESSIVE FINES AND CRUEL AND UNUSUAL PUNISHMENT.

All that is embraced in and prohibited by the Eighth Amendment was part and parcel "of the old constitutional law of the land" of England (IV. Blackstone Com. 379) and is consequently embraced in the Fourteenth Amendment, and now applies to the States under the requirement of "due process of law," which is the same as "the law of the land," as it applies to the general government under the Eighth Amendment.

Rufus Choate, in a similar case, (*Herrick* v. *Smith*, 1 Gray, 16) declared: "The forfeiture is nothing but a fine equalling in amount the value of the" forfeited property. The fine under the West Virginia constitution is the value of not less than 1,000 and possibly 100,000 acres of land, worth perhaps a million dollars, assessed without trial, notice, accusation or the production of witnesses. And the offense what? whose? *Gaines* v. *Buford*, 1 Dana, 481, opinion of Judge Nicholas.

FORFEITURE CANNOT BE DECLARED COLLATERALLY NOR EXCEPT BY A DIRECT JUDICIAL PROCEEDING.

There is no claim or evidence anywhere in the record that there has ever been any judgment or decree of forfeiture of the land in question, or any judicial proceeding to perfect or effect such forfeiture. The evidence offered is a auditor's certificate (p. 48). The position of appellees is that no judicial action is necessary, and that the question whether or not the land is forfeited, is a proper subject of original inquiry and determination in this cause.

The contention is combatted by appellant and overthrown by the authorities: *Gaines* v. *Buford*, 1 Dana 481; *Irwin* v. *Lumberman's Bank*, 2 Watts & S. 203; *Brookvill, &c., Turnpike Co.* v. *McCarthy*, 8 Ind., 392; *Barber* v. *Nelson*, 1 Little, 60; *Fairfax* v. *Hunter*, 7 Cranch, 602; *Moore* v. *Schoppert*, 22 W. Va., 282; III Blackstone Com., 358.

The auditor's certificate could not be made evidence by making it an exhibit to the answer, unless it was otherwise competent, and it can under the statute, be used only in proof of payment or non-payment of taxes upon "forfeited or delinquent land, or of their not having been entered upon the books of the assessor," Chap. 130, Sec. 5, Code 1891. The forfeiture must be proven before such evidence is offered. One would not be permitted to prove the *loss* of a deed by a copy which might be proper evidence of the contents of the lost deed, after the loss is established.

If one is to be deprived of his land without judge, jury or witnesses, upon the mere certificate of an officer, he has a right to insist upon strict construction of the statute under which such certificate is offered.

SOME PARALLEL CASES.

Some cases that have dealt with statutes so closely similar to the provision of the state constitution in question, and have discussed the principles involved, with such learning and force as to be of special value upon most or all points made in this case, and which sustain the positions here taken are, *Marshall* v. *McDaniel*, 12 Bush. (Ky.) 378; *Gaines* v. *Buford*,

1 Dana (Ky.) 481; *State* v. *Heeman*, 70 Mo. 441; *Scharf, Comr. of Land Office* v. *Tasker*, 73 Md. 380; *Eastern Land Lumber & Mfg. Co.* v. *State Board of Education*, 101 N. C. 35; *Phelps* v. *Chesson*, 12 Ired. (N. C.) 198.

THE FORFEITURE NOT A REVENUE MEASURE.

Those who have defended the forfeiture law have generally done so, first upon the theory that it is a punishment of the land owner for the monstrous crime of not seeing to it that the public officers keep his land properly charged with taxes; but realizing the legal objections to punishing a person without trial, hearing or accusation, they resolve that the forfeiture must be a tax law, which admits of rather summary enforcement. But a tax law is for the purpose of revenue and not for the enforcement of penalties. Taxation is for the support of government, not for the punishment of offenders, and does not treat the land owner as a criminal whose estate is to be confiscated rather than as a loyal subject upon whom a just and proportionate share of necessary public exactions are to be made. Trifling penalties for negligence in paying taxes that have been assessed are sometimes imposed and collected with the tax, by a sale of the property, and the courts have, with much reluctance, given sanction thereto; but in such case the penalty was a mere incident to the tax and the proceedings for collecting it, and not the sole or principal object of the law or the proceeding.

To class as a tax law or revenue law an enactment that does not lay or enforce a tax or exact or produce revenue, but merely extorts a penalty that is not intended to, and generally does not, go to the public, requires a strain that no well ordered mind can endure. Virginia and West Virginia from the beginning of their history have at all times had the usual well known methods of assessing and collecting taxes, not essentially different from those employed in other states, and forfeiture of this sort is not one of them. The Supreme Court of Virginia has so declared. Judge Joynes speaking for the court in *Martin* v. *Snowden* and *Bennett* v. *Hunter*, 18 Gratt. 139, says:

"As I have already intimated, this class of forfeitures has not been employed in Virginia as one of the usual means of enforcing the pay-

ment of taxes, but rather for the purpose of establishing titles and settling vacant and abandoned lands."

AS TO STATE USAGE.

Another prop to support the forfeiture provision of the state constitution is the assertion that it follow the long established usage of Virginia.

The above quoted words from *Martin* v. *Snowden*, were written in 1868 and referred to the Act. of Feb. 27th, 1835, the only act under which there were ever any forfeitures for non-assessment, the act of 1810 never having gone into operation by reason of the time being extended up to the time of its repeal in 1814. Forfeitures for non-payment of taxes, without sale, have sometimes been erroneously classed with forfeitures for non-assessment or non-entry; but of the latter kind there were never any in Virginia from its discovery to the present moment, except under the single act of 1835—thirty-one years before the Fourteenth Amendment prohibited such acts, which the state constitution did not, twenty-eight years before the state of West Virginia was created and thirty-seven years before her present constitution was adopted, the Fourteenth Amendment being after her creation, but before the adoption of the present constitution.

This contention of long established custom is not sustained, for if a single instance or act could establish a custom, long disuse would disestablish it; and this custom had been "honored in the breach" for nearly thirty years when the Virginias parted company, and among the laws of Virginia that the constitution of the new state continued in force, there were none for forfeiture of lands. If this or any other land had not been charged with taxes in Virginia for the whole period of time from 1838 to the present, there could have been no forfeiture; for as defendant says in its answer (p. 44-5), "the State of Virginia has no similar laws," and the defendant in the suit referred to "could not rely upon the forfeiture of plaintiff's title for non-payment of taxes or other reason, because there was no statute to sustain such contention." Indeed the part of this land lying in Virginia was not assessed in Virginia for several years after the war, the whole tract being previously

entered in Logan County, which upon division of the state, became wholly a part of West Virginia.

SUIT FOR SALE OF FORFEITED LAND.

It has been urged with surprising appearance of seriousness, that the statutory suits in chancery by the state to sell forfeited, escheated, waste and unappropriated land, and land sold to the state for taxes, which permits former owners and claimants to become parties, afford to every person a judicial hearing and due process of law; but this position can only be taken by abandoning the other, that the constitution itself is due process of law, for if it is, there is no need for anything more.

The errors in the contention are numerous and manifest. If the constitution "by operation of" itself works the forfeiture and divests and transfers the title, it deprives a person of property; and if this "operation" is not due process of law, it deprives that person of his property without due process of law, and subsequent proceedings of whatever kind avail nothing. The Fourteenth Amendment is not satisfied with a regularly conducted coroner's inquest over the remains of a man who has been unlawfully done to death under color of authority.

All these suits and all the statutes that have provided for them are and have been for the purpose, not of decreeing and effecting a forfeiture, but of selling the land that the constitution had already forfeited, or rather that had been forfeited to Virginia or sold for taxes to the one state or the other and not redeemed within one year, for there has been very little else subject to their operation. If the land is forfeited in any way, it is not in or by these suits but before they were begun, and they are to dispose of so much of the already forfeited title, if any, as has not been transferred to various claimants by sec. 3 of Art. XIII. of the constitution. If the "former owner" redeems, he does not recover that part of his land that is claimed by them.

None of the statutes of this sort nor the proceedings under them could aid the constitution, nor were they expected or intended to do so; the constitution and the forfeiture by it are valid or invalid without regard to them. The Act of 1872–3

adopted contemporaneously with the constitution and which has been held to authorize a proceeding simply to dispose of land belonging to the state, a proceeding neither *in personam* nor *in rem*, (*McClure* v. *Maitland*, 24 W. Va., 561), continued in force for ten years or more, and although subsequent and existing acts permit of parties to the suits provided for, it is to permit the determination of claims to the surplus proceeds of the sale, claims to the benefits of Sec. 3, Art. XIII, and claims to the right to redeem, etc.; but the complete forfeiture and transfer of the title of the "former owner" must previously have been accomplished by the constitution as a condition prerequisite to the institution of any suit. The suit and every thing done in it is subsequent to the *deprivation of property*.

Nor is it true, as it has been asserted, that the "former owner" can upon his own petition have a suit brought, in which he may redeem the land, or that he may mandamus any officer; for he has no right to redeem, unless his title is forfeited, and if it is forfeited, he has no interest in the land—is "as much a stranger as if he had never heard of it." So it has been held, (*McClure* v. *Maupertuis*, 29 W. Va., 641), whether rightly or wrongly, and the "former owner" has had no power but *pursuasion* to induce any officer to take action, until which action was taken and suit brought, the would be redemptioner is "out in the cold."

CONCERNING THE EFFECT OF DECLARING THE FORFEITURE LAW VOID.

As a strenuous reason why the forfeiture provision should be sustained and upheld, whether in accord with the letter or spirit of the Federal Constitution or not, is urged the assertion that many titles would be overturned by holding it invalid, it being declared that a large part of the land in the state has been forfeited by the constitution and new titles have come out of the forfeiture.

It is inconceivable that this statement should be true, and it is not. It is inconceivable that, except in rare and peculiar cases, land should improperly escape assessment, and it does not. In all the cases that have come before the Supreme Court of West Virginia, *McClure* v. *Maitland*, 24 W. Va.,

561; *Auvil* v, *Iaeger*, 24 Id., 583; *McClure* v. *Maupertuis*, 29 Id., 633; all involving large grants, and all other reported cases, not an acre of land forfeited for non-assessment or by the constitution has been concerned. All the land in those cases had been *sold to the state for delinquent taxes that had been assessed.* With forfeiture of such land neither the constitution nor this case has anything to do. All the forfeiture cases found in the state courts, except three or four now pending, deal and have dealt, with land that has been *sold* to the state for *taxes* or had been forfeited by the Act of 1835.

Two cases only, so far as my knowledge or information goes, involving this present forfeiture question, or land charged to be forfeited to West Virginia for non-assessment, have ever come before the Supreme Court of the State, and those are pending now and were argued more than a year ago; and in the circuit courts of the state there have been, so far at I am advised, in the past five years, not more than half a dozen cases, including the two now in the Supreme Court, two of which in the circuit court relate to this Morris grant and one to another Swan tract involved in *Read* v. *Dingess.* In all these cases, and except *Read* v. *Dingess*, in all the cases in the Federal Courts where this question has arisen—*Buskirk* v. *King*, 72 Fed. 22; *Bartlett* v. *Ambrose*, 78 Fed., 839; I have been of counsel, and I challenge the assertion that, aside from this Morris grant and the McClary grant (*Read* v. *Dingess*) there is to be found any considerable quantity of land that is within the operation of sec. 6, Art. XIII.

The attempt has been made to treat land sold to the state for taxes and not redeemed within five years as forfeited for *non-assessment* for five years, and the non-assessed land that has alarmed some people, is of this sort. But that position has been lately disposed of by the Circuit Court of Appeals, *Sayers* v. *Buckhardt*, 85 Fed. 247, which holds that such land cannot be forfeited for non-entry because of the statute prohibiting the entry.

The overturning of titles is done by the forfeiture law,—this court can but turn them back and let them be regulated by due process of law.

The present defendant is a fair sample of the "citizens who are to be driven from their homes," etc. To some of the

land and timber that this lumber company has bought it has doubtless good title by prescription; to the rest it has none, unless the State is permitted to make a donation of appellant's title, which neither any state policy or supposed exigency nor anticipated consequence can justify or this court permit, against the letter or the spirit of the Federal Constitution; for this court has said (Ex Parte Milligan 4 Wall. 120):

"The Constitution of the United States is a law for rulers and people equally in war and in peace, and covers with the shield of its protection, all classes of men at all times and under all circumstances. No doctrine involving more pernicious consequences ever was invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."

BONA FIDE PURCHASE.

Complainant's amended bill (p. 55-6) alleges that the record of forfeited lands which the law requires the auditor to keep and which he has kept from 1883 and earlier to date, does not show the land in question or any part of it to be forfeited, and that complainant had no knowledge or notice that the land was or was claimed or supposed to be forfeited, and that he purchased same in good faith for upwards of $300,000 in reliance upon the public records and the fact that the land had been for some twenty years up to a short time before his purchase, a trust estate under the management of the U. S. Circuit Court. This allegation is not disputed by defendants. He also alleges that upon discovering the claim of forfeiture he made every offer and effort to pay all taxes, but the same was refused.

If the proper reports and records of the pretended forfeiture had been made, as required by the Code (Chap. CV, 1; Chap. XXXI., 39) it may be presumed that complainant would have become advised of the claim in time to decline the purchase, but the State having failed, through her agents, to warn complainant, she is estopped now to claim the land, and defendants are estopped to the same extent.

Fletcher v. *Peck*, 6 Cranch, 122, 3, 9; *The Bank* v. *Poitiaux*, 3 Rand, 146; *Eastern Land & Mfg. Co.* v. *State Board of Education*, 101 N. C., 46; *State* v. *Flint, &c., R. R. Co.*, 89 Mich.

481, and many cases cited; Bigelow on Estop, 349; *U. S.* v. *Lochlin*, 30 Fed., 147; *Clark* v. *U. S.*, 95 U. S., 539.

INJUNCTION.

No question was made that injunction would issue upon such a bill as the one in this case, pending an action of ejectment. That question came up upon the motion for injunction and the case was held to be a proper one, the question being well settled and sustained by the authorities. *Buskirk* v. *King*, 72 Fed., 22; *King* v. *Stuart*, 84 Fed., 546; *Ulman* v. *Ritter*, 72 Fed., 1000; *Wood* v. *Braxton*, 54 Fed., 1005; *Ehrhardt* v. *Boaro*, 113 U. S. 537.

The injunction could be dissolved or the bill dismissed, only for total failure of complainant's title, the determination of which should have been left to the action of ejectment then pending.

JURISDICTION.

In this case the bill, by amendment, disclosed the constitutional question, and the amendment relates back to the commencement of the suit; and this case is not open to the objection taken to No. 157, if there by any force in it.

It is submitted that the bill and amended bill of complainant and the whole record disclose a just and meritorious case on the part of appellant, and the decree appealed from should be reversed and the provision of the state constitution complained of should be held to be invalid.

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